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In the Supreme Court of the United States

OCTOBER TERM, 1973

DONALD E. JOHNSON, ADMINISTRATOR OF VETERANS'
AFFAIRS, ET AL., APPELLANTS

v.

WILLIAM ROBERT ROBISON

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE APPELLANTS

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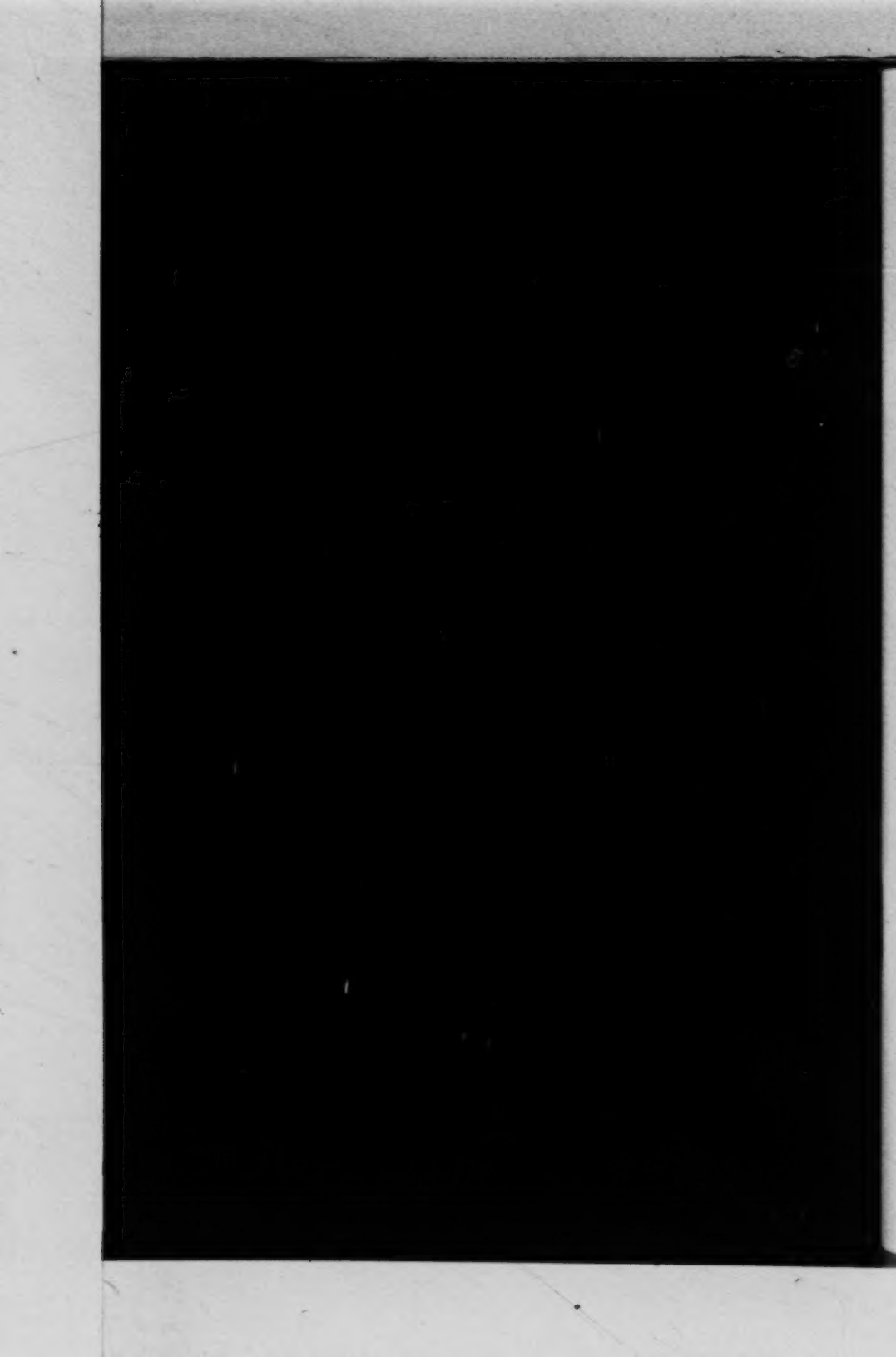
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BRIEF FOR THE APPELLANTS

OPINION BELOW

The opinion of the district court (J.S. App. A) is reported at 352 F. Supp. 848.

JURISDICTION

The judgment of the district court (J.S. App. B) declaring unconstitutional portions of 38 U.S.C. 1652 (a)(1), 1661(a) and 101(21), was entered on January 4, 1973. A notice of appeal to this Court (J.S. App. C) was filed on January 22, 1973. The jurisdictional statement was filed on March 22, 1973, and on

May 14, 1973, the Court postponed further consideration of the question of jurisdiction to the hearing of the case on the merits (App. 16).¹ The jurisdiction of this Court rests on 28 U.S.C. 1252; the basis for this conclusion is discussed *infra* at pp. 9-12.

QUESTIONS PRESENTED

1. Whether the Veterans Readjustment Benefits Act violates the Due Process Clause of the Fifth Amendment by excluding from eligibility for educational benefits conscientious objectors who have performed civilian service as an alternative to induction into the armed forces.

2. Whether the statutory prohibition against judicial review of the decisions of the Veterans Administration bars review of the claim that the statute under which the Veterans Administration denied such benefits is unconstitutional.

STATUTES INVOLVED

28 U.S.C. 1252 provides in pertinent part:

Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, * * * holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.

¹ The Court's order also sets the present case for argument with No. 72-700, *Hernandez v. Veterans Administration*.

28 U.S.C. 2282 provides:

An interloutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

38 U.S.C. 211(a), as amended, provides:

On and after October 17, 1940, except as provided in sections 775, 784, and as to matters arising under chapter 37 of this title, the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

38 U.S.C. 1652(a)(1) provides:

The term "eligible veteran" means any veteran who (A) served on active duty for a period of more than 180 days any part of which occurred after January 31, 1955, and who was discharged or released therefrom under conditions other than dishonorable or (B) was discharged or released from active duty after such date for a service-connected disability.

38 U.S.C. 1661(a) provides:

Except as provided in subsection (c) and in the second sentence of this subsection, each eligible veteran shall be entitled to educational assistance under this chapter for a period of one and one-half months (or the equivalent thereof in part-time educational assistance) for each month or fraction thereof of his service on active duty after January 31, 1955. If an eligible veteran has served a period of 18 months or more on active duty after January 31, 1955, and has been released from such service under conditions that would satisfy his active duty obligations, he shall be entitled to educational assistance under this chapter for a period of 36 months (or the equivalent thereof in part-time educational assistance).

38 U.S.C. 101(21) provides, in pertinent part:

The term "active duty" means—

(A) full-time duty in the Armed Forces, other than active duty for training;

STATEMENT

Appellee was a conscientious objector who was exempted from induction into the armed forces and performed civilian alternative service pursuant to Section 6(j) of the Selective Service Act, 50 U.S.C. App. 456(j), and the governing regulations of the Selective Service System, 32 C.F.R. Part 1660 (1971).² Upon completion of his alternative service,

² Section 6(j) of the Selective Service Act recognizes and provides for two kinds of conscientious objectors:

a. Those registrants who, while opposed to participation in

appellee sought educational benefits, pursuant to the Veterans Readjustment Benefits Act of 1966, 38 U.S.C. 1651-1687, to assist him in pursuing his legal studies.* The Veterans Administration denied benefits since, under the Act, they can be paid only to veterans who have served on active duty.⁴ 38 U.S.C. 1652(a) (1), 101(2) and (21).

Appellee thereupon instituted the present action in the district court, on his own behalf and on behalf of a class of similarly situated conscientious objectors, seeking a declaratory judgment that the Veterans Readjustment Benefits Act violates the Due Process Clause of the Fifth Amendment and the Free Exercise Clause of the First Amendment since it does not

war, may be inducted into the armed forces to perform non-combatant service (see 32 C.F.R. 1622.11).

b. Those registrants who, in addition to their opposition to participation in war, also oppose noncombatant service. Such registrants are not subject to induction into the armed forces but may be required to perform civilian work ("alternative service") which contributes to "the maintenance of the national health, safety, or interest * * *" (see 32 C.F.R. 1622.14, 1622.16).

All references herein to C.F.R. are to the 1971 edition which contains the regulations in effect during appellee's alternative service.

* Appellee performed alternative service at Peter Brent Brigham Hospital in Boston from May, 1968, to May, 1970 (App. 11). In September 1971, he enrolled at Northeastern Law School and at that time applied for educational assistance under the Act (App. 12). Appellee's application for benefits filed with the VA reflects that he also completed his college studies in May, 1970.

⁴ Conscientious objectors who perform noncombatant service serve on active duty, and thus become veterans who may be entitled to educational benefits if they otherwise qualify.

provide educational assistance to conscientious objectors who have performed civilian alternative service (App. 5-9). Acting on appellee's motion for summary judgment and the government's motion to dismiss, the district court entered judgment declaring unconstitutional, on due process grounds, the provisions of the Act which deny educational assistance to persons who perform civilian service and declaring that such service "shall be considered 'active duty' within the meaning of [the Veterans Readjustment Benefits Act]" for purposes of entitling appellee and members of his class to benefits under that Act (J.S. App. B, p. 28a).

The court held that the provision of the Veterans Act precluding judicial review of decisions of the Veterans Administration (38 U.S.C. 211(a)) did not bar it from entertaining the suit because the claim arose "under the Constitution, not under the statute whose validity is challenged" (J.S. App. A, p. 8a).

On the merits, the court recognized that the "reasonable basis" standard governed the validity of the statute under the Due Process Clause (J.S. App. A, pp. 9a-13a), and it further acknowledged that the statute "does not appear to be invidious" (J.S. App. A, p. 12a). The court nevertheless ruled invalid the congressional failure to provide educational benefits to conscientious objectors who had performed civilian alternative service. The court held there was no rational connection between the purposes of this veterans benefits program—to make military service more attractive and to compensate persons for disruption of their civilian lives—and the exclusion from it of conscientious objectors such as appellee who had

performed civilian service. On that basis, therefore, it concluded that the statute was so arbitrary that it violated the Due Process Clause of the Fifth Amendment (J.S. App. A, pp. 15a-19a) * and entered a declaratory judgment finding appellee and all members of his class of conscientious objectors to be eligible for educational assistance under the Act "to the same degree and extent as veterans of military service" (J.S. App. B, pp. 27a-28a).*

SUMMARY OF ARGUMENT

I

This Court has jurisdiction over this appeal under 28 U.S.C. 1252, which permits a direct appeal from a decision of a single district judge holding a federal statute unconstitutional. There is no need to remand the case for consideration by a three-judge court under 28 U.S.C. 2282: there was no application for an injunction, and the declaratory judgment successfully sought does not pose the threat of paralyzing federal programs pending review by this Court. Therefore, both the language and the policy of 28 U.S.C. 2282 indicate its inapplicability to this case.

II

The purposes of the Veterans Readjustment Benefits Act are both the enhancement of military service and the compensation of veterans for the disruption

* The court rejected appellee's First Amendment arguments (J.S. App. A, pp. 21a-23a).

* The court subsequently stayed its judgment pending this appeal.

of their lives caused by such service. The exclusion of conscientious objectors who have performed alternative civilian service from the benefits of the Act does not offend the equal protection concept of the Fifth Amendment's Due Process Clause, since such exclusion is rationally related to these purposes. The applicable test is not the one applied by the district court—whether the inclusion of appellee's class would have been inconsistent with the statutory purpose—but instead the narrower one whether the exclusion is totally unrelated to any legitimate statutory purpose.

In providing for payment of benefits, Congress must determine how best to allocate available funds to achieve the desired purpose. Congress is not required to adopt the broadest classification consistent with its legislative purpose. It was entirely appropriate for Congress to conclude that the extension of benefits to conscientious objectors who performed alternative service would not aid in making military service attractive. Moreover, it could legitimately conclude that subjection to the rigors of military service was inherently more disruptive of civilian life than was the performance of alternative civilian service, and thus the former, but not the latter, merited recompense.

III

The Administrator determined that appellee was not entitled to benefits under the Veterans Readjustment Benefits Act. Appellee thereupon brought the instant action for a declaratory judgment against the Administrator "for actions he has taken and

threatens to take in his official capacity and under color of federal law" (App. 6). The basis for this suit is therefore the Administrator's determination that appellee is not entitled to benefits. This determination is made non-reviewable in any court by 38 U.S.C. 211(a). In concluding that 38 U.S.C. 211(a) does not apply to allegations of the unconstitutionality of the statute under which the Administrator acts, the district court was in error, and acted inconsistently with decisions of courts of appeals in other circuits.

Section 211(a) is constitutional as so applied. This Court, in *Lynch v. United States*, 292 U.S. 571, stated the principle that Congress can preclude judicial review of noncontractual veterans benefits regardless of "the source of the right sought to be enforced," since "[w]hen the United States creates rights in individuals against itself, it is under no obligation to provide a remedy through the courts" (*id.* at 582). *Lynch* has been consistently followed; the courts of appeals have accordingly held that 38 U.S.C. 211(a) constitutionally bars judicial review of the validity of a statute upon which an Administrator's determination is based.

ARGUMENT

I. THIS COURT HAS JURISDICTION OVER THE APPEAL.

This Court's jurisdiction rests upon 28 U.S.C. 1252, which provides in pertinent part that "[a]ny party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, * * * holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or

any officer or employee thereof, as such officer or employee, is a party.”⁷ If, however, the case should have been heard by a three-judge district court pursuant to 28 U.S.C. 2282, this Court must vacate the judgment below and remand the case for consideration by a proper panel. *Flemming v. Nestor*, 363 U.S. 603, 607; *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 152-153.⁸

Section 2282 provides that “[a]n interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted” unless the application therefor is heard and determined by a three-judge court. Appellee sought only a declaratory judgment, however, and not an injunction to restrain the operation of a federal statute, and no injunction issued. Thus, 28 U.S.C. 2282 does not by its terms apply. *Flemming v. Nestor*, 363 U.S. 603.⁹

⁷ If this Court has jurisdiction under 28 U.S.C. 1252, the appeal brings up the “whole case” (*United States v. Raines*, 302 U.S. 17, 27, n. 7), including the question of the district court’s jurisdiction (see, *infra*, pp. 20-28).

⁸ That panel would, of course, first have to consider whether it had jurisdiction to hear the case despite 38 U.S.C. 211(a).

⁹ Cf. *Phillips v. United States*, 312 U.S. 246, 248-251, in which this Court analyzed the history and purpose of the predecessor of 28 U.S.C. 2281, the parallel provision applicable to injunctions against state statutes, and concluded that it was intended “not as a measure of broad social policy to be construed with great liberality, but as an enactment technical in the strict sense of the term and to be applied as such.”

In *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 154, however, the Court left open the question whether an action seeking only declaratory relief "would under all circumstances be inappropriate for consideration by a three judge court." That question similarly need not be decided in this case since, as in *Mendoza-Martinez*, a three-judge court would not have been appropriate here.

That case involved a declaratory judgment action instituted by *Mendoza-Martinez* asserting the unconstitutionality of a section of the Nationality Act which had led to the institution of deportation proceedings against him. The Court concluded that such an action "involves none of the dangers to which Congress was addressing itself [in 28 U.S.C. 2282]. The relief sought and the order entered affected an Act of Congress in a totally noncoercive fashion. There was no interdiction of the operation at large of the statute. It was declared unconstitutional, but without even an injunctive sanction against the application of the statute by the Government to *Mendoza-Martinez*. Pending review in the Court of Appeals and in this Court, the Government has been free to continue to apply the statute. That being the case, there is here no conflict with the purpose of Congress to provide for the convocation of a three-judge court whenever the operation of a statutory scheme may be immediately disrupted before a final judicial determination of the validity of the trial court's order can be obtained. Thus there was no reason whatever in this case to invoke the special and extraordinary procedure of a three-judge court." [*Id.* at 155.]

Similarly, here, the operation at large of the Veterans Readjustment Benefits Act has not been interdicted; nor does the judgment below compel the government to take any specific action with respect to appellee and members of his class. It simply declares that "alternate service" shall be considered "active duty" within the meaning of the applicable statutes.¹⁰

In addition, there is here no question of "restraining the enforcement, operation or execution of any Act of Congress" in the sense of restricting actions directed by statute. Instead, the effect of the judgment below is merely to require the Administrator to consider certain applications for benefits. In such circumstances the risk that a single judge may be able to "paralyze totally the operation of an entire regulatory scheme" (*Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 154) does not arise. What is at stake here is whether federal programs must be extended to persons the statute does not cover. This question does not pose the same risk of immediate disruption of federal programs prior to final judicial determination as does an attempt to enjoin enforcement of a statute, since, if the order is not stayed pending a direct appeal, applications can be accepted and considered while awaiting the resolution of the question of the proper scope of the statute.

¹⁰ Cf. Mr. Justice Brennan's opinion in *Perez v. Ledesma*, 401 U.S. 82, 125-126, stating that a declaratory judgment "is a much milder form of relief than an injunction. Though it may be persuasive, it is not ultimately coercive; noncompliance with it may be inappropriate, but is not contempt."

II. THE PROVISION IN THE VETERANS READJUSTMENT BENEFITS ACT LIMITING BENEFITS TO VETERANS WHO SERVED ON ACTIVE DUTY SATISFIES DUE PROCESS

A. THE DUE PROCESS CLAUSE REQUIRES ONLY THAT THE LEGISLATIVE CLASSIFICATION HAVE A REASONABLE BASIS

The classification of beneficiaries in a public benefit statute, such as the Veterans Act, does not offend due process or equal protection so long as there is some "reasonable basis" for the legislative classification. *Dandridge v. Williams*, 397 U.S. 471, 485. See also *Jefferson v. Hackney*, 406 U.S. 535, 546, 551; *Ortwein v. Schwab*, No. 72-5431, decided March 5, 1973, slip op. 4-5. *Richardson v. Belcher*, 404 U.S. 78, 81; *Flemming v. Nestor*, 363 U.S. 603, 611; cf. *United States v. Kras*, 409 U.S. 434, 446.

In *Richardson v. Belcher*, *supra*, 404 U.S. at 84, this Court emphasized the narrow scope of judicial review in cases such as this:

We have no occasion, within our limited function under the Constitution, to consider whether the legitimate purposes of Congress might have been better served by [a different classification], or to judge for ourselves whether the apprehensions of Congress were justified by the facts. If the goals sought are legitimate, and the classification adopted is rationally related to the achievement of those goals, then the action of Congress is not so arbitrary as to violate the Due Process Clause of the Fifth Amendment.

Thus, the question for decision is not whether the inclusion of persons in appellee's class would have better served the avowed congressional purposes, whether Congress has dealt comprehensively with the problems identified,¹¹ or even whether the exclusion adopted is entirely logically consistent with its purposes. *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487-488. Rather, the question is only whether the exclusion is based on "reasons totally unrelated to the pursuit of [a legitimate legislative] goal." *McDonald v. Board of Election*, 394 U.S. 802, 809.

It is also important to recognize the interrelationship of the legitimate goals served by the legislation, and to avoid emphasizing one to the exclusion of others that are equally valid. As this Court noted in *McGinnis v. Royster*, No. 71-718, decided February 21, 1973, slip op. 13-14:

* * * [O]ur decisions do not authorize courts to pick and choose among legitimate legislative aims to determine which is primary and which subordinate. Rather, legislative solutions must be respected if the "distinctions drawn have some basis in practical experience," *South Carolina v. Katzenbach*, 383 U.S. 301, 331 (1966), or if some legitimate state interest is advanced, *Dandridge v. Williams*, 397 U.S. 471, 486 (1970). So long as the [legislative] purpose upholding a statutory class is legitimate and nonillusory, its lack of primacy is not disqualifying.

¹¹ See *Dandridge v. Williams*, 397 U.S. 471, 487, where this Court recognized that the legislature bore the "difficult responsibility of allocating limited * * * funds among the myriad of potential recipients."

*** Legislation is frequently multipurposed: the removal of even a "subordinate" purpose may shift altogether consensus of legislative judgment supporting the statute. Permitting nullification of statutory classifications based rationally on a nonprimary legislative purpose would allow courts to peruse legislative proceedings for subtle emphases supporting subjective impressions and preferences. The Equal Protection Clause does not countenance such speculative probing into the purposes of a coordinate branch. We have supplied no imaginary basis or purpose for this statutory scheme, but we likewise refuse to discard a clear and legitimate purpose because the court below perceived another to be primary.

We submit that under these principles the Veterans Readjustment Benefits Act satisfies due process.

B. THERE IS AMPLE JUSTIFICATION FOR THE LEGISLATIVE DECISION TO LIMIT EDUCATIONAL BENEFITS TO VETERANS WHO SERVED ON ACTIVE DUTY

Appellee challenges the congressional classification which makes educational benefits available to veterans of active military service in the armed forces, but does not extend such benefits to conscientious objectors who performed alternative civilian service. The court below analyzed the legislative goals specified in 38 U.S.C. 1651,¹² and found that there was no

¹² "The Congress of the United States hereby declares that the education program created by this chapter is for the purpose of (1) enhancing and making more attractive service in the Armed Forces of the United States, (2) extending the benefits of a higher education to qualified and deserving young persons who might not otherwise be able to afford such an

rational basis for the exclusion. In so doing, it first concluded there was no rational connection between the exclusion and the congressional desire to make military service attractive, and then, taking the other three specified goals as evidence of a congressional desire only "to compensate persons for the disruption of their civilian lives" (J.S. App. A, p. 19a), it concluded that this disruption was suffered equally by persons in appellee's class, and thus rejected this as a rational basis for distinction. Both conclusions are in error.

1. In analyzing the relation of the exclusion to the expressed aim of "enhancing and making more attractive service in the Armed Forces," the court below recognized that this was a legitimate aspect of the government's interest in raising armies. But it then considered whether the payment of educational benefits to alternative service conscientious objectors would interfere with this function, and, concluding that it would not, found no rational connection between the exclusion and the goal. This analysis overlooks an unnamed but basic goal of all federal spending programs: to allocate available tax monies so that they most efficiently serve government purposes.

The proper inquiry is therefore not whether the payment of educational benefits to alternative service

education, (3) providing vocational readjustment and restoring lost educational opportunities to those service men and women whose careers have been interrupted or impeded by reason of active duty after January 31, 1955, and (4) aiding such persons in attaining the vocational and educational status which they might normally have aspired to and obtained had they not served their country."

conscientious objectors would *disserve* the statutory goal. There is no constitutional compulsion that requires Congress to allocate funds for payments which would clearly not aid in the achievement of its goal: Congress is not required to make the largest classification consistent with its identified goals. Nothing in the Constitution requires a legislature to "choose between attacking every aspect of a problem or not attacking the problem at all" (*Dandridge v. Williams*, 397 U.S. 471, 487).¹³

Thus, "so long as the distinctions drawn have some basis in practical experience" (*South Carolina v. Katzenbach*, 383 U.S. 301, 331), Congress may identify the class to be benefitted as narrowly as it deems appropriate to achieve its goal within the costs it is willing to allocate. The district court itself recognized that the distinction between veterans of military service and alternative service conscientious objectors has a basis in practical experience (J.S. App. A, pp. 17a, 19a-20a).¹⁴ More is not required.

2. The district court believed the other three specified congressional purposes to be "basically variations on a single theme, * * * [i.e.] to compensate veterans for the deprivation of educational and economic op-

¹³ Congress did attack one aspect of the problem created by appellee's conscientious objection to military service by permitting him to satisfy his obligation by performing alternative service. It was not required to attack the further aspect of that problem caused by the difference in his service from his usual pursuits on the one hand and military service on the other.

¹⁴ The district court in the companion *Hernandez* case correctly observed that "[s]uch contentions must fall of their own weight because the differences between these groups are manifest." 339 F. Supp. 913, 914-915.

portunities that inhere in military service and not to reward them for their exposure to the physical risks of military life" (J.S. App. A, pp. 17a-18a). Since, in the court's view the performers of alternative service were equally unable, during their period of service, to "pursue the educational and economic objectives that persons not subject to the draft law could pursue," they too must be entitled to benefits (J.S. App. A, p. 20a). This was so in part because "inclusion would in no way tend to defeat the legislation's admirable goal of eliminating one of the inequities produced by the draft law and service life" (J.S. App. A, p. 20a).

Again, the court applied an incorrect test. The question is not whether another classification would have served the legislative purpose as well, or even been preferable, in the court's view. The question is instead whether the classification adopted is "totally unrelated" to the goals to be achieved. *McDonald v. Board of Election*, 394 U.S. 802, 809.

Congress had a rational basis for determining that the disruption of the lives of veterans of active military service has been sufficiently greater than that of alternative service conscientious objectors to justify payments to the former while refusing them to the latter. The district court recognized that "it is abundantly clear that active duty is more rigorous, demanding and hazardous than alternate service" (J.S. App. A, p. 17a). It is also abundantly clear that Congress was well aware of this fact, and was concerned in this statute with the serious disruption caused by *military service*; it believed that special attention ought to be given to veterans in their readjustment to

civilian life from military life. See, *e.g.*, S. Rep. No. 269, 89th Cong., 1st Sess., p. 8;¹⁵ H. Rep. No. 1258, 89th Cong., 2d Sess., p. 4.¹⁶

Thus, even assuming that an alternative service conscientious objector must move to a different city and interrupt his educational or vocational career temporarily,¹⁷ this interruption involves a significantly different personal adjustment than the disruption caused by the very nature of military service, and

¹⁵ "The major part of the burden caused by these cold war conditions quite obviously falls upon those of our youths who are called to extended tours of active military service. It is they who must serve in the Armed Forces throughout troubled parts of the world, thereby subjecting themselves to the mental and physical hazards as well as the economic and family detriments which are peculiar to military service and which do not exist in normal civil life. It is they who, upon separation from service, find themselves far, far behind those in their age group whose lives have not been disrupted by military service" (S. Rep. No. 269, *supra*, p. 8).

¹⁶ "Today our servicemen are scattered throughout the world, and in many instances are serving under combat or near-combat conditions. During the period of time which is covered by this bill, our Nation has gone through a series of crises associated with Cuba, the Dominican Republic, Taiwan-Matsu, Lebanon, Berlin, Laos, and Vietnam. The perpetual cold war condition, with its crises, compulsory military service, and expanded overseas commitments, makes this bill necessary if our servicemen, during this tense period of history, are to receive equitable treatment" (H. Rep. No. 1258, *supra*, p. 4).

¹⁷ Appellee apparently himself suffered no serious interruption in his educational career, since he graduated from college at the same time he completed his alternative service. Even if, in individual cases, alternative service conscientious objectors suffered disruptions of their lives, and servicemen did not, this would not indicate that the classification was arbitrary. *Dandridge v. Williams*, *supra*, 397 U.S. at 485.

its special impact upon the serviceman.¹⁸ The eligible veteran has been subject not only to the potential for hazardous military duty, but also to military discipline and the greater day-to-day limitations on personal freedom.¹⁹

It was in consideration of the total disruptive effect of military service that Congress determined that educational benefits were appropriate. It is of the essence of the legislative function to make such determinations and classifications. That it could, with equal constitutionality, have determined to extend such benefits to members of appellee's class does not invalidate the decision not to do so, on the basis of evident distinctions in the two types of service.²⁰ The question of the social desirability of granting educational benefits to conscientious objectors who have performed alternative service is for Congress, not the courts, to determine.

¹⁸ Indeed, the very name of the statute—the Veterans Readjustment Benefits Act—emphasizes congressional concern with the veteran's need for assistance in readjusting to civilian life.

¹⁹ In addition, Congress noted that veterans remain subject to an Active Reserve obligation after discharge, which "impedes the cold war veterans' full participation in civil life, which, in turn, again exposes them to unfair competition from their civilian contemporaries." S. Rep. No. 269, 89th Cong., 1st Sess., p. 10.

²⁰ In exercising its legislative function, Congress also determined to make commissioned officers in the Public Health Service and the National Oceanic and Atmospheric Administration eligible for educational benefits (38 U.S.C. 101 (21), 1652 (a) (3)). This represents a legislative decision that the need to enhance the attractiveness of such service and to compensate for the disruption of lives caused by such service merits the expenditure of public funds to provide the benefits. It does not require the extension of such benefits to appellee for his clearly different service.

III. THE STATUTE BARRING JUDICIAL REVIEW OF DECISIONS OF THE VETERANS ADMINISTRATION (38 U.S.C. 211(a)) PRECLUDED THE DISTRICT COURT FROM ENTERTAINING THIS CASE

Since, as we have shown, the Veterans Readjustment Benefits Act is constitutional, the decision below must be reversed. There is, therefore, no need for this Court to consider whether the court below also erred in holding that 38 U.S.C. 211(a), which bars judicial review of certain decisions of the Administrator, was inapplicable to this case. We contend, however, that this conclusion was also incorrect.

A. 38 U.S.C. 211(b) BARS JUDICIAL CONSIDERATION OF THE CONSTITUTIONALITY OF THE STATUTE UNDER WHICH THE ADMINISTRATOR ACTS

The "no-review" statute, 38 U.S.C. 211(a), provides in relevant part that:

the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans * * * shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

Before its amendment in 1970, the statute made final "the decisions of the Administrator on any question of law or fact concerning a claim for benefits or payments under [certain] law[s] administered by the Veterans' Administration" (38 U.S.C. (1964 ed.) 211 (a)). The Court of Appeals for the District of Columbia Circuit interpreted this language as permitting

review of the Administrator's actions subsequent to an original grant of benefits.²⁰

The 1970 amendment was designed to change this interpretation. The House Committee on 'Veterans' Affairs indicated that the earlier language "would seem to be perfectly clear in expressing the congressional intent that any and all decisions of the Administrator on questions of entitlement to veterans' benefits (except for certain contractual benefits which were specifically excluded from the application of this provision) were to be final and not subject to judicial review." H. Rep. No. 91-1166, 91st Cong., 2d Sess., p. 9. The Committee stated that through a "fairly tortured construction," the court of appeals had departed from the legislative intent that the exemption be "all inclusive." The amendment was therefore intended to "make it perfectly clear that the Congress intends to exclude from judicial review all determinations with respect to noncontractual benefits for veterans and their dependents and survivors." H. Rep. No. 91-1166, *supra*, pp. 10-11.

Although the particular problem that concerned Congress was judicial review of the Administrator's decisions after the original grant of benefits, Congress made clear that the non-review provision was intended to cover "all determinations" with respect to non-contractual veterans benefits. Indeed, this Court recognized that the purpose of the predecessor provision "appears to have been to remove the possibility of judicial relief in that class of cases" involving "grants

²⁰ *Wellman v. Whittier, Administrator*, 259 F. 2d 163; *Thompson v. Gleason, Administrator*, 317 F. 2d 901; *Tracy v. Gleason, Administrator*, 379 F. 2d 460.

to veterans and their dependents—pensions, compensation allowances and special privileges, all of which are gratuities” (*Lynch v. United States*, 292 U.S. 571, 587). The educational benefits involved in this case are such gratuities.²¹

Appellee’s complaint alleges that the Administrator is sued for “actions he has taken and threatens to take in his official capacity and under color of federal law” (App. 6). It also shows that the Administrator denied appellee benefits on the basis of the governing statute (App. 7-8). It is this decision of the Administrator which is the basis for appellee’s suit. The suit thus challenges the Administrator’s decision denying appellee benefits and Section 211(a) bars judicial review.

The district court, however, concluded that Section 211(a) does not cover this case because “[t]he questions of law presented in these proceedings arise under the Constitution, not under the statute whose validity is challenged” (J.S. App. A, p. 8a). But a challenge to the validity of a statute on any basis necessarily is a question of law arising under that statute. Resolution of such questions involves consideration of the purpose and effect of the statute, as is evident from the district court opinion. Such questions are, pursuant to 38 U.S.C. 211(a), the exclusive province of the Administrator.

²¹ Congress has provided that Section 211(a) shall apply to the administration of the Veterans Readjustment Benefits Act of 1966. The 1966 Act itself amended Section 211(a) so as to bring within its purview the administration of the newly created education program (Section 4(h); Pub. L. 89-358, 80 Stat. 24). See H. Rep. No. 1258, *supra*, p. 15.

Moreover, the district court's restrictive interpretation of Section 211(a) is not consistent with the congressional intent. The language of Section 211(a) is purposely broad, in order to exclude from judicial review "all determinations" of the Administrator in the administration of the specified laws. Congress did not provide that an allegation of the unconstitutionality of the governing statute would be enough to avoid the Section 211(a) ban on judicial review, and the district court erred in putting such a gloss on the statute.

It may be assumed that a primary purpose of 38 U.S.C. 211(a) was to avoid flooding the courts with suits challenging the decisions of the Administrator in the application of laws concerning noncontractual veterans benefits. To be sure, there will not be as many suits attacking the constitutionality of the statutes themselves as those challenging the implementation of the statutes. Nevertheless, and particularly in view of the current increase in suits testing the constitutionality of a wide variety of social welfare legislation, the volume of such cases may be substantial. It is thus appropriate to interpret Section 211(a) so as to avoid burdening the courts with *all* suits challenging the Administrator's decisions.

Other courts of appeals have held 38 U.S.C. 211(a) applicable when the constitutionality of the statute under which the Administrator acts is challenged. In *Hoffmaster v. Veterans Administration*, 444 F.2d 192 (C.A. 3), the applicant for benefits alleged that the limitation on attorney's fees in the basic statute was unconstitutional; in *Hernandez v. Veterans Administration*, 467 F.2d 479 (C.A. 9), certiorari granted,

May 14, 1973, No. 72-700, the challenge was, as here, that the basic statute violated due process. Both courts correctly held that Section 211(a) bars the courts from considering these claims.

B. CONGRESS MAY CONSTITUTIONALLY BAR JUDICIAL REVIEW OF THE ADMINISTRATOR'S DECISIONS CONCERNING VETERANS BENEFITS

Perhaps the district court construed the statute narrowly because of doubt that Congress could validly bar review of challenges to the constitutionality of the Benefits Act. That preclusion of review, however, was within Congress' power.

In *Lynch v. United States*, 292 U.S. 571, 581, 582, this Court (speaking through Mr. Justice Brandeis) reaffirmed the principle that Congress can preclude judicial review of "gratuitous [veterans'] privileges" "whatever the character of the proceeding or the source of the right sought to be enforced" and that the government's immunity from suit in this area "applies alike to causes of action arising under acts of Congress * * * and to those arising from some violation of rights conferred upon the citizen by the Constitution." In *Lynch*, this Court explained further that "[w]hen the United States creates rights in individuals against itself, it is under no obligation to provide a remedy through the courts. * * * It may limit the individual to administrative remedies." *Id.* at 582.²²

Although this analysis was not necessary to the decision in *Lynch*, it has been repeatedly relied upon

²² See also *Hill v. United States*, 149 U.S. 593 (alleged violation of constitutional rights); *United States v. Babcock*, 250 U.S. 328, 331; *Tutun v. United States*, 270 U.S. 568, 576; *Schillinger v. United States*, 155 U.S. 163.

since. For instance, this Court, speaking through Mr. Justice Douglas, observed in *Maricopa County v. Valley Bank*, 318 U.S. 357, 362: " * * * the power to withdraw the privilege of suing the United States or its instrumentalities knows no limitations. *Lynch v. United States*, 292 U.S. 571, 581-582, and cases cited." ²³

²³ In recently reviewing *Lynch* and other leading authorities of this Court and the lower courts with respect to the validity of Section 211(a), the District of Columbia Circuit stated (*de Rodulfa v. United States*, 461 F. 2d 1240, 1257-1258, certiorari denied, 409 U.S. 949, footnotes omitted):

We conclude that the fact that adjudication of claims for noncontractual benefits is confided to the Administrator of Veterans' Affairs does not alone afford ground for constitutional complaint. Courts before which the constitutionality of predecessor provisions or counterparts of new Section 211(a) has been questioned have uniformly upheld those provisions. The array of decisions doing so prominently includes several of our own, and we are not disposed to discard them even if we were free to do so.

The constitutional adjudications find common ground in the thesis, as expressed by the First Circuit, that "veterans' benefits are gratuities and establish no vested rights in the recipients so that they may be withdrawn by

Congress at any time and under such conditions as Congress may impose." That proposition had its origin in a line of Supreme Court decisions, and despite possible indication that that thesis may be waning, we are obliged to accept it unless and until it is disapproved. We think, too, that there is another predicate possessing at least an equal measure of vitality. The Supreme Court has declared that "the United States, when it creates rights in individuals against itself, is under no obligation to provide a remedy through the courts;" "it may," instead, "provide an administrative remedy and make it exclusive * * *." That is precisely what Congress did in the current version of Section 211(a), and Congress was well within its legislative prerogatives when it did so.

The principles enunciated in *Lynch* cover and sustain the preclusion of judicial review of the Administrator's decision denying veterans educational benefits to one who performed civilian rather than military service. The Administrator's action involved no present or potential exercise of governmental power against appellee; it merely withheld from him, in accord with the congressional directive, an advantage he desires. Several leading commentators have noted the breadth of congressional power to exclude judicial review in situations which involve "gratuities," or "government grants" rather than "areas in which administrative power reaches out against the individual" (Jaffe, *Judicial Control of Administrative Action*, 355 (1965)) or situations "having the direct impact on private persons of a governmentally-created and judicially-enforceable duty, or of an immediate deprivation of liberty or property by extra-judicial action" (Hart and Wechsler, *the Federal Courts and the Federal System*, 347 (2d ed., 1973)).²⁴ Appellee merely seeks an extension to him of the public benefits which have been made available to veterans as part of a national *policy of appreciation* for military service.²⁵

²⁴ Accord, 4 Davis, *Administrative Law Treatise*, § 28.18, pp. 98, 103-104 (1958 ed.).

²⁵ In the district court, the government relied upon 38 U.S.C. 211(a) to show that the court lacked jurisdiction over this case. There is, however, a serious question whether there is any statutory grant of jurisdiction on which appellee's suit can rest, regardless of the applicability of 38 U.S.C. 211(a). The maximum amount of benefits to which appellee, who has no dependents, could be entitled under 38 U.S.C. 1682(a) (as

In any event, since the underlying statute is, as we have shown, clearly constitutional, there would be no occasion for this Court here to consider the ultimate constitutional reach of 38 U.S.C. 211(a).²²

amended by Pub. L. 92-540, 86 Stat. 1074, §§ 102(2), 401(4) is \$7,920. The separate claims of other members of his class may not be aggregated to satisfy the \$10,000 jurisdictional amount requirement of 28 U.S.C. 1331, assuming it otherwise to be applicable. See *Snyder v. Harris*, 394 U.S. 332 (diversity action).

The Declaratory Judgment Act, 28 U.S.C. 2201, 2202, does not extend the jurisdiction of the federal courts; it merely provides a remedy for cases otherwise within the court's jurisdiction. *Skelly Oil Co. v. Phillips Co.*, 339 U.S. 667, 671.

Appellee's allegation that jurisdiction is based on 28 U.S.C. 1361, permitting actions "in the nature of mandamus," overlooks the fact that only a declaratory judgment was sought. As noted in our discussion of *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, *supra*, at pp. 10-12, the declaratory judgment of the court below does not compel the government to take any specific action. This is thus no more an action "in the nature of mandamus" than it is one appropriate for decision by a three-judge court. 28 U.S.C. 1361 simply does not authorize a suit for a declaratory judgment absent any request for mandatory relief against a federal official.

The other jurisdictional statutes cited by appellee (App. 5) are irrelevant: 28 U.S.C. 1337 applies to statutes regulating commerce, and 28 U.S.C. 1343 grants jurisdiction over certain civil actions involving civil rights.

²² Accord, *Hernandez v. Veterans Administration*, *supra*, 467 F. 2d at 480. See also *Seese v. Bethlehem Steel Co.*, 168 F. 2d 58, 65 (C.A. 4), where Judge Parker stated, in construing a preclusion of review in the Portal to Portal Act of 1947: "Whether the denial of jurisdiction would be valid if the provision striking down the claims [on the merits] were invalid is a question which does not arise." Compare *Battaglia v. General Motors Corp.*, 169 F. 2d 254, 257 (C.A. 2), certiorari denied, 335 U.S. 887.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted.

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